UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SEPTEMBER 11 LITIGATION	:	**ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO VACATE**
	:	21 MC 101 (formerly 21 MC 97) (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff has filed two motions: a motion to reconsider and amend my Opinion and Order of July 24, 2008 Regulating Fees and Disapproving Settlements; and a motion to vacate my Order of July 29, 2008 vacating a previous Order of Final Judgment of March 19, 2008 that approved those settlements. Both motions are denied.

The Motion for Reconsideration contends that my Opinion and Order contains material inaccuracies. The Azrael firm contends that it had two cases among the six that were to be tried on a damages-only basis, and not none. However, the only case of the four Azrael cases at issue in my July 24 opinion that were scheduled for a damages-only trial, 03 Civ. 6966, named a different plaintiff, had a different civil action number, and listed a firm other than Azrael Gann & Franz as the attorneys. The other Azrael case that was identified for a damages-only trial has already settled, within the bounds of earlier settlements. Azrael accepted a 15 percent contingent fee for that case.

Moreover, as I understand the events, neither of the cases was actually prepared for trial. Azrael strenuously objected to its cases being identified for damages-only trials, prompting me to announce at one point that the Azrael cases would go last. (I made one exception, at my instance and without request from Azrael, because of a plaintiff who was of advanced age.) Azrael was not involved in either of the two cases that I set for the first of the

trials: Driscoll (02 Civ. 7912), on September 24, 2007, and Ambrose (02 Civ. 7150) to follow, on November 5, 2007. Both cases settled; other settlements followed; and I determined that there was no need for damages-only trials for the cases that remained.

Azrael was not involved in either Driscoll or Ambrose. Such time as his firm may have contributed does not justify a higher fee than other lawyers obtained. Nor is there anything in those two cases that could justify an unusually higher settlement for the four Azrael cases.

Azrael complains that I criticized the firm for not having time records and for not submitting expense records. I did not criticize the firm. But Azrael knew that it would need documentation of services to justify a higher contingent fee than others were paid. Azrael's exhibits of reconstructed services and expenses do not provide after-the-fact justification of a higher fee, nor cause me to reconsider my earlier rulings. The issue is not whether the Azrael firm delivered services; surely, its lawyers did. The issue was whether the time and effort were so out of the ordinary that a higher fee is justified than was permitted by the protocol guiding other attorneys who agreed to settlements, and this court's approvals of settlements. For the reasons discussed in my earlier decision, Azrael's reconstructed submissions do not justify a higher fee.

The balance of Azrael's motion takes issue with the comments expressed in my opinion about the firm's strategy for the timing of settlement negotiations and the value of Azrael's services. My comments accurately express my observations of court proceedings and of the opinions I reached. Jonathan Azrael states an opposite opinion about the value of his firm's services. But there is nothing in what he says that causes me to change my rulings that the fee his firm seeks contradicts the protocol that guided everyone's efforts, that his effort for a higher fee was not justified, and that the settlements obtained for his clients were disproportionately and unreasonably high.

I do not dispute that the settlements were reached after "extensive negotiations," that counsel were "experienced," and that "individual circumstances" came into play. I did not lightly overturn the products of those negotiations. But, as I wrote and often told the lawyers, "this is not an ordinary case", nor will "the wounds of 9/11" "easily be assuaged". There is intense public interest in these cases, and there must be understanding and public acceptance that, while lawsuits to redress injuries are appropriate and recovery for losses justified, the cases do not become, and will not become, a feeding trough of excessive settlements for tort claimants and their lawyers.

The motion to vacate argues, first, that the court lacked jurisdiction to vacate its prior order, sua sponte, and that it denied due process when it did so. The arguments are without merit.

The Air Transportation Safety and System Stabilization Act ("ATSSSA") confers exclusive jurisdiction on the United States District Court for the Southern District of New York over all cases arising or resulting from, or related to the terrorist-related aircraft crashes on September 11, 2001 into the World Trade Center, the Pentagon, and the field in Shanksville, Pennsylvania. Section 408(b)(1), (b)(3), 49 U.S.C. § 40101. Plaintiffs' claim, although styled as an argument about jurisdiction, is really a complaint that the Court erred. But it did not err.

The court has the power to review, and to vacate or modify, a previous order, particularly when an adverse party has not been prejudiced in the interim. Fed. R. Civ. P. 60(b) (Court may grant relief from a prior order or judgment for mistake, inadvertence, surprise, excusable neglect, or any other reason that justifies relief); R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 924 F.Supp. 714, 716 (E.D.Va. 1996) (noting that the court has power to sua sponte reconsider a prior order either pursuant to Rule 60(b) or "under its inherent power to modify and interpret its original order"); See Tiberg v. Warren, 192 F. 458, 463 (9th Cir. 1911)

("It is a general rule of the law . . . that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court.") (citing Bronson v. Schulten, 104 U.S. 410, 415 (1881)).

No prejudice from the Court's order of March 19, 2008 has been shown. The order providing for the payment and distributions of the settlement award was still to come, and it was at that point that the Court became alerted to the excessiveness of the settlement and the contingent fee. The Opinion and Order of July 24, 2008 followed.

Plaintiffs argue that the court should have given notice to the parties and an opportunity to be heard before vacating its order. Plaintiffs argue that the order "denies due process because it is so imprecise that discriminatory application is a real possibility". Plaintiffs cite Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), a case that is inapposite. In Gentile, the Court examined a Nevada professional rule that prohibits a lawyer from making statements to the press that have a substantial likelihood of materially prejudicing an adjudicative proceeding. In Gentile, the Supreme Court expressed concern that the vagueness of the rule could lend itself to discriminatory regulation of speech in possible violation of petitioner's First Amendment rights. Id. at 1050. Plaintiffs also cite Grayned v. City of Rockford, 408 U.S. 104 (1972), a case that concerns an appeal from an allegedly vague anti-noise ordinance violation. The case before me does not implicate First Amendment rights. In any event, plaintiffs' motions to reconsider and to vacate reflect a full opportunity for the plaintiffs to object to my order vacating the settlement.

Plaintiffs argue that the settlements cannot be excessive (no matter how large), for "an excess of available insurance coverage" will remain, "of at least 1 billion dollars," and that

amount "cannot be accessed by other claimants." However, the court was never asked to decide the limits of available insurance, or who could be the beneficiaries, or in what circumstances amounts could be paid, and in respect of what occurrences, or whether any marshaling of an airline's, or an airline-security company's, insurance could be ordered where terrorists may have pursued a common plan using different aircraft of an airline company, or several airline companies, for their assault on the United States and its citizens. Without rulings by the court, no litigant could know, or have assurance, of the limits or application of available insurance, or of the impact of their settlements on remaining cases.

I disapproved the settlements also for additional reasons, because they were disproportionately and unreasonably large in relation to previous settlements, and because they defied the protocol that guided the earlier settlements, the attorneys who negotiated those settlements, and the court in its approvals of those settlements.

Plaintiffs complain that I compared their settlements "against a secret standard which they did not know," and "still do not know." They complain that they have no "chance to review or rebut" such a standard. This concern reflects a complicated problem.

The secrecy required by the protocol was ordered because plaintiffs strongly requested secrecy, and because defendants seconded their request, and without objection from any party.[1] Sept. 8, 2005 Conf. Tr., at 29-31. I expressed reservations, id., but deferred to the desires of all counsel. Plaintiffs cannot now complain of the term of a protocol on which all relied, and none objected.[2]

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[1] The lessee of the Twin Tower of the World Trade Center objected, but a procedure was developed to satisfy that party.

[2] Azrael could file a motion, on notice to all potentially affected parties, asking to be relieved of that term of the protocol, and recommending such terms and limitations as it considers appropriate.

Lastly, plaintiffs argue that special considerations justify their larger settlements. They argue that Virginia law governs, for it is the State where the crash occurred, and that its law is not "inconsistent with or preempted by federal law". ATSSSA, Section 408(b)(2), 49 U.S.C. § 40101. Under Virginia law, decedents' successors can recover for their "[s]orrow, mental anguish, and solace". Va. Code Ann. § 8.01-52.[3] The previous settlements involved crashes occurring in New York and Pennsylvania, States that do not allow recoveries by survivors for their grief. Spinrad v. Gasser, 235 A.D.2d 687, 688 (N.Y. App. Div. 1997); Gaydos v. Domabyl, 152 A. 549, 552 (Pa. 1930). Comparisons are further complicated by conflicts of law issues, for the law governing previous settlements could have been the law of any number of states, including the site of the crash, the place of screening of the hijackers, the locations of the decedent's domiciles, and other considerations. In re September 11 Litig., 494 F. Supp. 2d 232 (S.D.N.Y. 2007) (discussing the choice of law issues that arise in determining which state's law governs a particular decedent's claim, and how the choice of law may impact the damages available to the decedent's relatives).

State laws differ in the scope and limits of permissible recoveries from wrongful death tortfeasors. Dan B. Bobbs, et al., Prosser & Keeton on Torts § 127, 949-54 (5th ed. 1984) (describing the different kinds of damages available in different states); Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, 4 Harper, James & Gray on Torts §25.13 (3d ed. 2007) (noting the "considerable disparity" among methods of calculating damages in different jurisdictions within the United States); Robert A. Sedler & Aaron D. Twerski, State Choice of Law in Mass Tort Cases: A Response to "A View from the Legislature, 73 Marq. L. Rev. 625, 629 (1990) ("The differences from one state to another are not mere matters of detail, but affect

[3] The Virginia wrongful death statute reads in full: "The jury or the court, as the case may be, in any such action under § 8.01-50 may award such damage as to it may seem fair and just. The verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following: (1) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent . . . .".

basic issues of . . . recoverable damages."). In some states, it is the decedent's grief and anguish that is relevant; in others, like Virginia, only the survivors' grief and suffering are relevant. It is debatable which regime brings about larger recoveries.

I ordered an extensive playing of cockpit tapes salvaged from the Shanksville, Pennsylvania crash of United Airlines Flight 93, as relevant to the claims based on decedents' grief. Plaintiffs' counsel in those cases was interested to develop the struggle before and during the flight between several of the passengers and the terrorists to retake the cockpit and gain control of the aircraft. In re September 11 Litig., No. 21 MC 97, 2007 WL 2668608, at * 1 (S.D.N.Y. Sept. 12, 2007) (noting also that under New Jersey law, the State of the decedent's domicile, "a major item of damages in a survival action" is the pre-death pain and suffering experienced by the decedent, and noting plaintiffs' argument that "the CVR recording [may] contain[] probative evidence of substantial pre-death pain, suffering, terror, and emotional distress of the apprehension of certain death experienced by the passengers, both as to the time period of suffering and the intensity of such suffering"). Attorneys involved in the settlements of the passengers aboard the two aircraft that crashed into the World Trade Center, American Airlines Flight 11 and United Airlines Flight 175, also emphasized the terror and anguish of the passengers aboard those aircraft. Virginia law does not consider the decedents' grief and anguish material, see Va. Code Ann. § 8.01-52, and therefore it is doubtful that the terror and anguish of those aboard American Airlines Flight 77, the flight that crashed into the Pentagon, would have been allowed into evidence.

One cannot say which considerations more influence the amounts of settlements: those that argue from the grief of decedents, or those, from the grief of parents, spouses and children. Azrael's argument, that Virginia law justifies higher settlements, may have some merit in justifying a higher settlement, but not much merit. The fact that nothing in the papers that

sought to justify a 25 percent contingent fee made mention of Virginia special considerations, or any particular aspect of parents' or children's grief and suffering, implicitly concedes the point.

Azrael argues that deposition evidence justify higher settlements. But it was known from the 9/11 Commission Report, published in July 2004, about the actions of the terrorists, and the alleged inadequacy of security procedures to stop them from boarding their flights. Azrael's papers do not distinguish between the knowledge that preceded the earlier settlements, and his firm's settlements.

Plaintiffs' motion states that the court's order "caused severe upset, disappointment (and for some, anger)". "[R]einstatement of the four settlements," the motion argues, "will restore closure". I understand these emotions, and I understand, as well, the similar emotions of those who settled earlier. I did not issue my Opinion and Order of July 24, 2008 lightly. How should those who settled with the Special Master regard themselves and the process involving them if the current settlements are disproportionately out of line? How should those who settled earlier, in the faith that I would enforce my oft-made representation that earlier settlers would not be prejudiced by larger awards to later settlers, regard these disproportionately high settlements?

The Special Master of the Victim Compensation Fund issued awards that averaged $2,082,035.07 and were as high as $7,100,000.00. Department of Justice, Kenneth R. Feinberg, Esq., I Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001 Table No. 12, 110 (2004). Those who settled paid considerably less in fees and expenses, and many were represented free of charge. Their awards were not taxable. They did not suffer the pain, anguish and delay of traditional litigation. They settled via the Special Master, knowing that the values of their life insurance policies would reduce their recoveries, that they could not recover more than $250,000 for non-economic, emotional damage, and that

other circumstances might lessen the prospects of higher amounts that might be available to them in traditional lawsuits. Colaio v. Feinberg, 262 F. Supp. 2d 273 (S.D.N.Y. 2003).

More than ninety-seven percent of those eligible settled with the Special Master. Ninety-five of the remaining three percent sued and, except for a particular few, had to wait four to five years to gain recoveries. The wait could have been much longer. When they settled, they were not required to deduct the values of their life insurance; there were no ceilings for recoveries of pain and suffering; and there were certain other benefits in proving economic entitlements. But it is important, nonetheless, that higher settlement amounts be rationally justified. Equal treatment under the law of those equally situated is a maxim of justice that this court takes seriously.

In my opinion, the values negotiated by the lawyers for previous settlements have met this test of distributive justice. But the four settlements that I disapproved go outside the bounds. The highest previous settlement for a single person who died without significant earnings potential and without dependents or special circumstances was $4,650,000.00, and that settlement was substantially higher than earlier and later settlements. The $5,500,000 Azrael settlement for a single decedent survived by her parents and an adult sibling is much higher than even this very high prior settlement. Regarding the $7,000,000, $8,000,000 and $8,000,000 settlements for three married decedents survived by spouses and adult children, the highest previous settlement amount for a married decedent survived by adult children was $5,250,000 and for a married decedent with multiple dependent children, was $7,000,000. Again, the Azrael settlements are much higher. The prior settlements that approach the Azrael settlements involve decedents survived by dependent children and special circumstances related to high-earning decedent (actual or imminent), strict liability standards for certain cases, and the like.

All four Azrael settlements are unreasonably high. Their amounts cannot be explained by any special considerations. The contingent fees that are a significant cost of the settlements are also too high. I disapprove the settlements and the fees.

The plaintiffs' motions for reconsideration and to vacate my Opinion and Order of July 24, 2008 are both denied.

The status conference I had ordered in my Opinion and Order of July 24, 2008, and which thereafter was adjourned, is not needed, and is cancelled.

SO ORDERED.

Date: August 28, 2008
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge